

Fall 3-2-2002

Rights of Children: Educational and Legal Implications for Schools: An Australian Perspective

Douglas J. Stewart

Follow this and additional works at: <https://digitalcommons.law.byu.edu/elj>



Part of the [Civil Rights and Discrimination Commons](#), [Education Law Commons](#), and the [Juvenile Law Commons](#)

Recommended Citation

Douglas J. Stewart, *Rights of Children: Educational and Legal Implications for Schools: An Australian Perspective*, 2002 BYU Educ. & L.J. 255 (2002).

Available at: <https://digitalcommons.law.byu.edu/elj/vol2002/iss2/4>

.

RIGHTS OF CHILDREN: EDUCATIONAL AND LEGAL IMPLICATIONS FOR SCHOOLS: AN AUSTRALIAN PERSPECTIVE

*Douglas J. Stewart**

I. INTRODUCTION

Contemporary claims for full rights of children shroud a long and arduous evolution. Indeed, the cursory recognition given to the rights of children in the 1948 United Nations Declaration of Human Rights¹ and later in the International Covenant on Economic, Social, and Cultural Rights² illustrates most vividly the low priority given to any consideration of such rights up to that time. It is not surprising then to note Henry Foster and Doris Freed's claim that "the status of minority remain(s) relic of feudalism."³ The 1979 draft of the Convention of the Rights of the Child first gave meaningful international attention to children's rights as distinct from those rights derived from their parents or the State.

Despite being a signatory to the Convention, Sir William Dean, Australia's Governor General and former Judge of the High Court of Australia remarked in 1997 that "[t]here would. . . be few who would not recognize that in Australia, as elsewhere, we still have a considerable distance to travel between the actual and the ideal before there is adequate protection of the best interests of all children in all situations."⁴ Just two years earlier a noted Australian barrister wrote in vitriolic

* School of Professional Studies, Queensland University of Technology, Brisbane, Australia

1. *United Nations Declaration of Human Rights* art. 25, 26 (1948).

2. *International Covenant on Economic, Social, and Cultural Rights* art. 10 & 13 (1966).

3. Henry H. Foster & Doris Jonas Freed, *A Bill of Rights For Children*, Family L.Q. 343 (Winter 1972).

4. Sir William Dean, Opening Address, (First Asia Pacific Conference on Children's Rights, April, 2-5 1997) (Brisbane).

terms, "[t]he irresistible conclusion is that the State's rights attitudes of our many governments has led to a thoroughly ineffective proliferation of laws, institutions, policies and practices about children within Australia while greater concern is shown for Australia's 'image' . . ."⁵

This article addresses the development of children's rights within the framework of the human rights movement. Particular emphasis is given to the implications of Australia's signing and ratifying of the United Nations Convention on the Rights of the Child.

II. HUMAN RIGHTS

In providing clarification of the concepts associated with rights, commentators have noted the complexity surrounding the topic and the consequent difficulty in providing an acceptable, simple definition.⁶

In a wide-ranging and perceptive analysis of human rights in Australia, Peter Bailey acknowledges the complexity of human rights and suggests that although no final agreed definition of human rights exists, the 1948 Universal Declaration and its thirty Articles provide a useful starting statement.⁷ Furthermore, Bailey states, "the currently definitive international statement of the scope of human rights" is the Declaration along with two subsequent Covenants, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights, form the International Bill of Rights.⁸

Essentially, the Articles contained in these documents reflect the increasing concern of the international community for the rights of all peoples. The Articles impart concepts of justice, fairness, and equitable treatment that are frequently associated with human rights. However, they raise a number of problems including questions of what exactly constitutes justice and

5. Moira Rayner, *The Handbook of Children's Rights: Comparative Policy and Practice* 191 (Routledge 1995).

6. See e.g. Peter Bailey, *Human Rights: Australia in an International Context* (Butterworths 1990); Bob Franklin, *The Handbook of Children's Rights: Comparative Policy and Practice* (Routledge 1995); C.A. Wringe, *Children's Rights: A Philosophical Study* (Routledge & Kegan Paul 1981).

7. Bailey, *supra* n. 6.

8. *Id.* at 1.

whether it is a static concept holding good for all peoples, in all places, and at all times. In other words, the question is whether the interest of justice equality "means treating equals equally or unequals unequally."⁹ Such a principle suggests an ordering of rights that in turn raises questions of how one might justly arrive at such an order.

Regardless of definition, however, human rights are generally considered to be based on prevailing concepts of morality and are frequently seen as encompassing civil, political, economic, social, and cultural categories. Furthermore, a common argument is that only civil or political rights are universal and enforceable. In this regard, it is normally conceded that a human right does not need to be legally enforceable to be a right. Many rights are enforced while other rights are supported and implemented by social or community pressures. It is worth noting that most rights that have achieved customary status in a community do, over time, become ensconced in legislative provisions or in common law practices.

No matter what category of right (civil and political versus economic, social, and cultural), there is increasing recognition that important interconnections between them do not allow one to enjoy civil and political rights adequately unless there is satisfactory recognition of economic, social, and cultural rights and vice versa. Indeed, Bailey argues that the two groups of rights are inseparable, and it is important that they are implemented together rather than at the expense of each other.¹⁰ However, such a situation is not universal, and until it is, the seeking of civil and political rights will be accorded higher priority in some communities than in others in order to achieve freedoms of a political or legal nature. On the other hand, rights of an economic, social, or cultural nature allow wider freedom to enjoy aspects of living such as quality and enjoyment of life. These rights are perceived as goals to be achieved rather than goals that are legally enforceable. Furthermore, these rights usually vary greatly between nations and communities. It will readily be observed from this discussion that rights will vary according to many circumstances and will need then to "be balanced against other rights and the general wel-

9. See Aristototele, *Nicomachean Ethics*

10. Bailey, *supra* n. 6, at 20-25.

fare of the community.”¹¹

A. Human Rights in Australia

Human rights in Australia reflect Australia's gradual progression from a largely convict colonial status to that of a modern democracy. Thus, initial demands for human rights in this country reflect the desire for civil and political liberty for individuals, colonies, and the nation as a whole. After a century of Federation, one might expect that the Constitution of the Commonwealth of Australia would explicitly provide for a wide range of human rights, particularly because the founding fathers had a range of models incorporating such provisions to draw on. However, this is not the case; the terms of the Australian Constitution establish relatively few explicit provisions relating to human rights. However, as the Guardian of the Constitution, the High Court has exercised a conservative judicial review of human rights provisions. Thus, the High Court has not advanced the cause of human rights but has “interpreted restrictively” the human rights provisions contained in the Constitution, which include trial by jury, non-establishment and freedom of religion, a prohibition on state discrimination against interstate residents, a bar on acquisition of property except on just terms, and the election of popular representatives directly chosen by the people.¹² It is important to note that the Commonwealth Constitution framed in the economic and social milieu of the late nineteenth century contains no explicit provisions regarding education. Thus, almost by default education in Australia became the legislative responsibility of the States, which is similar to state responsibility for education legislation in the United States.¹³

The failure of the “founding fathers” to incorporate a wider range of human rights provisions in the Constitution is seen by a number of modern day activists as a weakness that must be addressed. Activists strongly argue for an Australian Bill of Rights that would protect the rights of individuals and groups.

11. *Commonwealth of Australia Bill of Rights*, Second Reading Hansard 1709 (9 Oct. 1985).

12. Garry Sturgess & Phillip Chubb, *Judging the World: Law and Politics in the World's Leading Courts* (Butterworths 1988).

13. Under the Constitution matters not specifically enumerated as being a responsibility of either the Commonwealth or the States became the responsibility of the States.

Such a Bill failed to win popular support despite efforts in 1977 and again in the late 1980s. There are many issues associated with an Australian Bill of Rights including the extent to which rights provisions can be framed to meet new social, economic, or cultural demands. A point well worth considering here is whether such a Bill should be established as part of the Australian Constitution, and, if so, would the difficulties traditionally faced in amending the Constitution inhibit future rights developments. Indeed, would the conservative decisions in the human rights area, which we noted previously to be part of the High Court, prove to be yet another obstacle. As a former Chief Justice Sir Harry Gibbs has remarked, "Undoubtedly a Constitutional Bill of Rights involves some departure from democratic principles, but some may think that it is a measure which democracy, in its decline, needs to take to assist in its own preservation."¹⁴

Notwithstanding the lack of a Bill of Rights, the Commonwealth and the States of Australia have adopted a number of conventions, protocols, or declarations that ensure a range of human rights are protected. In 1948, Australia was a party to the United Nations Declaration of Human Rights. Subsequently, Australia signed and ratified the International Covenant on Civil and Political Rights in 1975 and the International Covenant on Economic, Social, and Cultural Rights in 1980. However, Australians largely rely on Commonwealth or State and Territory legislation and various statutes dealing with sexual, racial, religious, and disability discrimination to protect their human rights.¹⁵

The Human Rights Commission Bill of 1977 was the first attempts to introduce human rights legislation directly into Australia. However, this Bill, together with a similar one introduced in 1979, lapsed. These attempts failed because of the uncertainty over whether provisions regarding rights of the child before, as well as after birth, should be included. In order to overcome this difficulty, the Commonwealth Parliament

14. Address to the Royal Australian Institute of Public Administration, Queensland, 27 February, 1986.

15. *Disability Discrimination Act* (1992) (CTH); *Anti-Discrimination Act* (1977) (NSW); *Equal Opportunity Act* (1995) (Vic); *Anti-Discrimination Act* (1991) (QLD); *Equal Opportunity Act* (1984) (SA); *Equal Opportunity Act* (1984) (WA); *Anti-Discrimination Act* (1998) (TAS); *Discrimination Act* (1991) (ACT); *Anti-Discrimination Act* (1992) (NT).

passed a new Human Rights Commission Bill containing a schedule document entitled "Declaration of the Rights of the Child" in 1981. This was followed by acceptance and ratification of the United Nations Convention on the Rights of the Child in 1990-1991.

However, international agreements entered into by the Commonwealth government have no effect in the States and Territories unless related domestic legislation is enacted by each of the jurisdictions or unless the Commonwealth government itself enacts legislation under its external affairs powers, which may have the effect of overriding State and Territory rights.¹⁶ This is a major constitutional, political, and legal issue in Australia. The High Court has held that S51 (XXIX)¹⁷ of the Constitution may be used by the Commonwealth Parliament to facilitate its external affairs powers to implement legislation in Australia.¹⁸ In *Koowarta v. Bjelke-Petersen*, the High Court considered the Racial Discrimination Act of 1975 that makes it unlawful to discriminate on grounds of race when the consequence is an impairment of any human right as defined in the 1965 International Convention on the Elimination of All Forms of Racial Discrimination.¹⁹ The Commonwealth as a party to this convention relied on S51 (XXIX) of the Constitution in an action in which the Queensland Government challenged the validity of the Act. Under S51 (XXIX), the Commonwealth has the power to pass laws geographically external to Australia and to enter into international treaties. However, such treaties, when entered into by the Commonwealth Government, do not automatically become binding within Australia unless they are actually ratified by the Commonwealth Parliament.

The powers of the Commonwealth were undoubtedly extended by the decisions of the High Court in the *Koowarta* and *Tasmanian Dam* cases.²⁰ It should be appreciated, however, as we are reminded by Vermeesch & Lindgren, that the "external affairs powers will only justify legislation to give effect to a bona fide treaty obligation (one not undertaken simply to ex-

16. *Commonwealth of Australia Constitution*, S.51(xxix).

17. This section provides for the power of the Commonwealth to legislate on matters to do with external affairs.

18. *Koowarta v. Bjelke-Petersen*, 56 ALJR 625 (1982); *Cmmw. v. St. of Tasmania*, 46 ALR 625 (1983) (The Tasmania Dam case).

19. *Koowarta*, 56 ALJR 625.

20. *Id.*; *Cmmw.* 46 ALR 625.

pand a legislative power), and the legislation must be an appropriate means of giving effect to the treaty. The Commonwealth has no power to legislate generally on the subject matter of a treaty.”²¹

The Commonwealth Act of 1981 provided for the establishment of a Human Rights Commission with a structure that would enable it to process complaints and enquiries. The Commission was given the resources to implement a range of research and educational activities. However, this Commission was short lived because a change of Government led to its replacement in 1986 by the Human Rights and Equal Opportunity Commission (HREOC) with a charter to promote human rights in Australia and to attempt dispute resolution by conciliation processes. The HREOC Act is an important development in the evolution of human rights in Australia. Indeed, Bailey has gone so far as to suggest that it will provide for “enactments that may progressively establish human rights standards which the States as well as the Commonwealth will be under obligation to observe.”²²

Other major legislative enactments by the Commonwealth include the Declaration of the Rights of Disabled Persons, the Convention against Discrimination in Education, the 1984 Sex Discrimination Act, the 1986 Affirmative Action Act, and 1987 the Affirmative Action Act. The Sex Discrimination Act was passed in order to give effect to Australia's responsibilities as a party to the U.N. Convention on the Elimination of All Forms of Discrimination Against Women. It provides for the elimination of discrimination on the grounds of sex, marital status, or pregnancy in a range of situations including employment and education. While the main thrust of these provisions is to achieve justice and equity for women, the Act applies equally to males. Breaches of the Act are disfavored but not illegal and thus attract the process of conciliation rather than criminal or civil actions.

Regardless of the provisions of the Commonwealth Statutes, there is still an urgent requirement for State legislation in the area of human rights. However, it is also worth noting in regard to the external affairs power being used to impose legis-

21. R. Vermeesch, & K. Lindgren, *Business Law Of Australia*, 73 (9th ed., Butterworths 1998).

22. Bailey, *supra* n. 6, at 144.

lation on unwilling States, that the High Court has held "that provided the legislation is general and not directed specifically at a State and that it does not threaten the existence of a State, or its general capacity to function, the law would be valid."²³

B. Children and Human Rights

The belief that children should have special protections befitting their natural development and interests is a social theme reflected in a literature that may be traced back to Rousseau. Such interests when perceived as rights have traditionally been derived from parents or the State and have been frequently equated with community norms and expectations. It is only since the 1970s that demands for recognition of the rights that inhere in children, rights they might plausibly claim for themselves, have been vigorously advanced.

Childhood, viewed as a period of minority status stretching to the age of eighteen years, is a social/cultural phenomenon of comparatively recent origin and has been largely restricted to Western/industrialized nations. In the anglo-celtic culture back until the late eighteenth century, children, particularly those of lower socio-economic background, lost their childhood status around eight years of age. At that stage of their lives they were expected to find a job and usually forced to leave home. Thus at age eight or thereabouts children lost the physical and psychological dependence of their parents and took on adult roles and responsibilities. It is now well documented that the industrial revolution in Western Europe did little to alleviate the plight of the masses, and that children became even more exploited. What rights they had then were derived from their parents to the extent that the law viewed children, particularly those from wealthy families, "primarily as agents for the devolution of property within an organized family setting."²⁴ The common law as well failed to establish any legal duty on the part of parents to support their children. Any responsibility that parents had in this regard was of a moral nature and "worth protecting only insofar as infractions on its performance may be thought to injure the present or long term interests of the parent."²⁵

23. *Id.* at 171.

24. John Eekelaar, *The Emergence of Children's Rights*, 6 Oxford J. of Leg. Stud. 163 (1986).

25. *Id.* at 166.

Some of the first serious attempts at providing legislative protection for children are to be found in the Factory and Mines Acts of nineteenth-century England. While those protections did not explicitly recognize any rights as inhering in children, they did emanate from the thinking of social reformers such as Shaftesbury, Bentham, and Mill. The gradual abolition of child labour, together with the introduction of compulsory elementary education, inexorably altered the status of minors in relation to their parents and the community. As Boer and Gleeson point out: "Instead of being part of an extended 'family' existing as a thriving economic unit, young people were downgraded in status because of their forced inability to contribute to the family income. Thus the condition of childhood became more prominent and attracted to itself a status much lower than that of adults."²⁶ These developments have resulted in new power relationships between children and their parents. The State has also begun to control and direct minors in ways previously considered unnecessary and undesirable.

The issues raised so far in relation to children's rights imply that minors have basic, developmental, and autonomy interests. These interests are recognized as either formal or informal rights. Formal rights are those rights recognized by legislative provision or common law decision. Thus, the rights safeguarded mainly cover basic and developmental interests. They might include measures such as safeguarding physical and emotional well being at home or at school.

Informal rights are not recognized by legal provisions but may receive recognition by appropriate court action. An example of a developmental right is a student at a government girls' high school in Sydney who brought an action against the New South Wales Education Department claiming a right to equal access to the same subjects as her brother at the local boys school. The Human Rights and Equal Opportunity Tribunal held that the student had been "treated less favorably" than her brother.²⁷ The original determination was upheld on appeal to the Supreme Court of New South Wales.

Other examples of developmental rights of minors that are particularly worrisome relate to the potential for educational

26. Ben Boer & Victor Gleeson, *The Law of Education*, § 203, 18 (Butterworths 1982).

27. *Leves v. Haines*, E.O.C. 92-167 (1986).

malpractice suits against teachers, administrators, or education systems. In this regard it is worth noting the conclusion of Shorten²⁸ concerning a recent House of Lords decision:

The judicial commentary on the issue of teachers' duty at common law to exercise the skill and care of reasonable teachers in educating their pupils indicates that English jurisprudence may well be moving in a different direction from American jurisprudence in this matter. This development in English jurisprudence may prove to be persuasive in Australian courts in the future.²⁹

Australian commitment with regard to human rights has tended to mirror developments in international forums. Thus, basic and developmental interests of children have been safeguarded in Australia during the greater part of the past century. In recent years, as a perusal of the provisions contained in the various Declarations and Conventions indicates, there has been a perceptible shift towards greater acceptance of the autonomy-interests of children. There appears also to be a shift in judicial thinking regarding autonomy rights of minors. In a 1985 decision in the House of Lords, Lords Scarman and Fraser opined that once a child "had reached sufficient understanding and maturity," it had full capacity to enter legal relationships without the consent of parents.³⁰ This would leave parents with no right to impose their own points of view on their children, irrespective of whether those points of view might be more in line with the child's paramount interests. A question well worth asking, but without ready answer, is whether a minor holds such a right even against the State when the State claims it is acting in the best interests of the child. Compulsory education, the sole responsibility of the State, is a case in point.³¹ Parents do not have a say in whether their children will attend school. However, might children who have reached "sufficient understanding and maturity" have the right to opt out of some stages of compulsory education? Societal interests currently would not be served by agreeing to the implementation of any right along these lines. However, the potential exists for

28. A. Shorten, *An English Court's Recent Decision on Educational Negligence May Have Weight in Australian Courts*, 3 *School Principal: Key Legal Issues for Principals* 11 (Nov. 2000).

29. *Phelps v. Hillingdon London Borough Council*, W.L.R. 18 (Aug. 2000).

30. *Gillick v. W. Norfolk and Wisbech Area Health Auth.*, 3 WLR 830 (1985).

31. *Ramsay v. Larsen*, 111 C.L.R. 16 (1964).

more radical developments in this area in the future.

Australian courts have supported the need to give appropriate recognition to the impact of International Treaties. To this end, Brennan J. stated in the landmark High Court decision in *Mabo*:

The common law does not necessarily conform with international law but international law is a legitimate and important influence on the development of the common law especially when international law declares the existence of universal human rights.³²

More recently in another High Court decision Mason, C.J. and Deane, J. said:

Ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention . . .³³

III. SCHOOLS AND CHILDREN'S RIGHTS

The Commonwealth Government signed the United Nations Convention on the Rights of the Child on August 22, 1990, ratified it in December, and brought it into effect on January 16, 1991.³⁴ It was noted previously that the Commonwealth has utilized its foreign affairs powers under S51 (XXIX) of the Constitution to enforce Racial Discrimination legislation on the States, and that the High Court in *Koowarta* upheld the validity of the legislation. Yet, no attempt has been made by the Commonwealth to utilize these provisions in relation to the

32. *Mabo v. Queensland*, (No. 2), 175 CLR 42 (1992).

33. *Minister for Immgr. and Ethnic Affairs v. Teoh*, 69 ALJR 423, 432 (1995).

34. *The Human Rights and Equal Opportunity Commission Act* (1986) (CTH).

Convention on the Rights of the Child. It is therefore the responsibility of each State and Territory to introduce legislation to give effect to the provisions of the Convention. Each jurisdiction has enacted legislation dealing with human rights including a range of anti-discrimination³⁵ and child protection statutes,³⁶ although no attempt has been made by the States and Territories to pass specific legislation giving effect to the provisions of the Convention on Children's Rights. Each of these statutes, as well as legislation passed by the Commonwealth, contain provisions that protect and extend the rights of children.

The main implication for Australia arising out of the Convention on the Rights of the Child is that it draws attention to the range of issues surrounding each of the various Articles. In reality, the provisions are goals that the Commonwealth, and hopefully the States, will continue to work towards achieving. Many of the goals have already been reached throughout Australia such as provisions recommending compulsory education at elementary and progressively, secondary levels.

The Convention contains fifty-four Articles of which thirty or more has considerable relevance for schools. Many Articles reflect the previously mentioned tendency to support autonomy claims of children. In this regard, the issues raised in the Convention call into question many current educational policies, practices, and structures. For example, Article 28 requires "States' Parties to take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity."³⁷ This Article should make the practice of corporal punishment in schools obsolete. Nonetheless, corporal punishment is still practiced in some non-government schools in Australia. Furthermore, it can be argued that Article 28 goes beyond the issue of corporal punishment and calls into question the entire relationship of children with respect to classroom management and behavior strategies.

Article 1 defines a child as being a person under the age of 18 years or earlier where national law so provides.³⁸ Recent arguments put forward in a number of countries, including Aus-

35. See e.g. *Koowarta*, 56 ALJR 625; *Commw.* 46 ALR 25.

36. See generally, *Child Protection Act*, (1999) (QLD); *Commission for Children and Young People Act* (2000) (QLD).

37. *The Human Rights and Equal Opportunity Act* (1986)(CTH).

38. *Id.*

tralia, suggest the age of majority should be lowered in order to give effect to the increasing demands surrounding autonomy interests of children. A move in this direction will have important repercussions in schools that already face considerable pressures in relation to students above the compulsory attendance age. This is a confusing and frustrating area for teachers and administrators alike. The higher retention rates to senior levels of schooling have resulted in a particularly confusing new range of educational problems.

Many schools have accepted the challenge and are facing up to the problems in innovative and relevant ways. One example of what schools can accomplish with their own resources can be seen in the State of Queensland. After considerable, often heated discussion with the teachers union, the local community, and the education authorities, it was agreed that subjects could be scheduled for evening classes. Senior students can now decide for themselves whether to attend their classes during the day or evening. Thus, some students have been able to accept daytime jobs or simply enjoy the leisure pursuits so ardently pursued in the State. In addition, a wide range of curricular offerings, as well as new management structures incorporating student involvement, has been implemented in many government and independent schools.

Increased retention rates have also caused schools to consider, more closely than perhaps they have previously, issues regarding the relevancy of curricula offerings. Article 28(c) reads in part that States Parties will "encourage the development of different forms of secondary education including general and vocational education [and] make them available and accessible to every child. . . ."³⁹ Programs entered into with tertiary institutions provide exciting exemplars of the possibilities for new educational arrangements that meet the requirements of providing different forms of education. Article 29 requires that education to be directed to "the development of the child's personality, talents and mental and physical abilities to their fullest potential."⁴⁰ Programs of this type essentially only meet developmental rights of students. However, they may also facilitate autonomy interests by offering them a choice based on their personal needs and wishes.

39. *Id.*

40. *Id.*

Article 3 declares that in "all actions concerning children. . . the best interests of the child shall be a primary consideration."⁴¹ Furthermore, Article 12 claims just such a right. It reads that a "child who is capable of forming his or her own views" has a right "to express these views freely in all matters affecting them."⁴² It would seem impossible for these best interests to be served without giving children the right to speak for themselves across a range of social, legal, and educational issues.

Article 13 extends this concept further. It suggests that children "shall have the right to freedom of expression including freedom to seek, receive, and impart information and ideas of all kinds."⁴³ While this Article is subject to a number of restrictions, it nevertheless raises some interesting and important issues such as students accessing subjects of their choice and their access to information available on the Internet.

Privacy is an issue of great concern in a contemporary society since technological advances make its invasion so simple. This concern, associated with the great amounts of personal, confidential, and sensitive information that schools are involved with, necessitates special consideration by educators. Educational administrators should already be sensitive to defamation actions that may arise in situations where information is misused. Article 16 of the Convention states that "[n]o child shall be subjected to arbitrary or unlawful interference with his or her privacy, family home or correspondence, nor to unlawful attacks on his or her honour and reputation."⁴⁴ It states further that the "child has the right to the protection of the law against such interference or attacks."⁴⁵ There is a need then to be particularly careful with the information held in school records and how it is stored and handled, particularly in light of the provisions of the Freedom of Information Act. Consideration must also be given to who has access to this information. Particular care needs to be taken with the writing up of school records, reports, or references. Moreover, the phraseology needs to be beyond reproach to avert any potential defamation action.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

Child abuse is a societal problem that has rightfully received a lot of attention in many countries, including Australia. Article 19 requires parties to the Convention to "take all appropriate measures to protect children from violence, injury or abuse, maltreatment or exploitation and to undertake prevention and support programs."⁴⁶ Most of the Australian States have introduced mandatory reporting by professionals, including teachers and medical practitioners, of instances where any of the various forms of child abuse are suspected. However, it is potentially possible, given Article 19 and should children be granted autonomy rights and full legal power, to bring a civil action against a teacher for failing to act or to act expeditiously where that teacher has knowledge that the child has been abused in some way. States that have not required mandatory reporting may inadvertently be placing educators at a disadvantage in such circumstances.

Article 23 provides for mentally or physically disabled children to enjoy a full and decent life.⁴⁷ This includes effective access to and receipt of education. In recent years the provision of education to children with special needs has been an issue of considerable concern to Australians. It is noteworthy in this regard that, despite the protections now afforded them under the various anti-discrimination statutes, as well as moves to integrate children with special needs into mainstream schools, there has been no attempt to formalize this process into the education legislation. Unlike the United States, where there are recognized guarantees concerning assessment, placement, and resources⁴⁸ provided for special needs students, no such guarantees exist in Australia. It is also the case that Australia does not have a single coordinated policy or agreed upon procedure relating to the education of children with such needs. Therefore, it is left to each jurisdiction to implement its own measures. However, the growing number of children with a disability who are seeking to have their educational rights recognized and met through various legal tribunals will inevitably bring increased attention to this problem.⁴⁹

46. *Id.*

47. *Id.*

48. See e.g. *Section 504 of the Rehabilitation Act*, 20 U.S.C. § 794 (1973); *Individuals with Education Disabilities Act*, 20 U.S.C. §§ 1400 *et seq.* (1975).

49. See e.g. "*L*" v. *Minister for Educ. for the St. of Queensland*, Queensland Anti-Discrimination Tribunal No. H39 (1995); *Demmery v. Dept. of Sch. Educ.*, New South

Article 30 requires parties to the Convention to respect the right of minorities to enjoy their own culture, religion, and language.⁵⁰ Other Articles deal with expected rights to freedom from economic exploitation, illicit drugs, sexual exploitation, and abuse, as well as degrading treatment or punishment. These provisions raise questions about the adequacy of the protection of the rights of indigenous children. It should be noted in this regard that on every social and economic measure indigenous Australians have been consistently reported as being in the lowest possible categories. Their health, longevity, and educational levels are widely recognized as being greatly inferior to other Australians. Thus, despite the many projects and the level of funding dedicated to indigenous people, it cannot be convincingly argued that Australia has measured up to its international obligations in relation to the rights of aboriginal children.

A recent concern is the rights of children of illegal immigrants to Australia who, as part of an international trend, have been arriving in this country in increasing numbers. These immigrants, adults, and children are incarcerated in detention centers in remote areas of the country as well as in off-shore locations. There are reports of various abuses against them that, if accurate, place Australia in breach of its responsibilities to children under the various Articles of the Convention.

IV. CONCLUSION

The discussion in this article has largely dealt with basic and developmental rights of children. It can be argued that recognition and acceptance of full autonomy rights for children remains a distant dream in Australia. It should also be noted that although Australia has gone a long way to meet the obligations imposed on it by ratifying various international treaties, there are still many areas that urgently need to be addressed. In this regard, it should be added that while there is a

Wales Equal Opportunity Tribunal (Nov. 1997) (Unreported); *Hashish v. Minister for Educ. of Queensland*, 2 QdR 18 (1998); *Finney & Anor v. The Hills Grammar Sch.*, EOC 93 020 (1999); *Hoggan v. The St. of New S. Wales (Dept. of Educ.)*, Human Rights & Equal Opportunity Commn. No. 98/127 (November 13, 2000) (Unreported); *I v. O'Rourke and Corinda St. High Sch. and Minister for Educ. for Queensland*, QADT 1 (Jan. 31, 2001).

50. *The Human Rights and Equal Opportunity Commission Act*, art. 30 (1986) (CTH).

close connection between the provisions contained in the Convention and safeguards already offered by the criminal or civil law, these do not necessarily provide adequate protection to children in our society.

Issues associated with children's rights inevitably involve political decisions. Children's rights are, as Chisholm commented over twenty years ago "values about how society ought to work and how it should be organized." In this regard, each Article in the Convention on the Rights of the Child impacts Australian policies and procedures in some way. The greatest impact is felt in the fields of health and education. However, acceptance of the demands for recognition that children have distinct, legally-enforceable rights must also encompass the concept that children have responsibilities. Rights need to be seen in direct relation to the child's developing capacities and maturity. As Eekelaar has rightly remarked "[c]hildren will have, in wider measure than ever before, that most dangerous but most precious of rights: the right to make their own mistakes."⁵¹

51. Eekelaar, *supra* n. 24, at 182.